No. 90-693

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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C. STATEMENT OF THE CASE

Petitioner (hereinafter "Johnson") does not dispute any portion of respondent's (hereinafter the "Bank") Statement of the Case, except that portion which states that "Johnson is *delinquent* in his payments under the plan in the amount of $109,890.00 as of December 1, 1990." (Res. Brief, p. 4, emphasis added). Johnson admits that he has made no payments to the Bank on the plan since the initial $10,000.00 payment which was due on December 1, 1987. However, since January 3, 1989, the date the district court's decision was entered reversing the order of the bankruptcy court which confirmed the plan, Johnson has had no obligation to make plan payments because there was no plan. Therefore, he is not "deliquent" on any plan payments.[1]

Also, the Bank states that "Johnson made no other payments to the trustee as required by the February 27, 1989, stay pending appeal." (Res. Brief, p. 3.) While Johnson admits that only one $17,000.00 payment was made to the trustee pursuant to the district court's order, the record is unclear as to whether the district court required additional payments by Johnson to the trustee as a condition of the continuation of the stay pending appeal. (See R-DC 24, 25, 26, 27, 28 and 29). Johnson asserts that after the district court entered its order of May 4, 1989 (R-DC 27), no further payments were required.

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[1] Even if Johnson were to make plan payments, the Bank would have no right to them. Absent a confirmed bankruptcy plan, the Bank may only collect its judgment by selling Johnson's land.

D. ARGUMENT

1. THE EFFECT OF JOHNSON'S PRIOR CHAPTER 7 DISCHARGE IS LIMITED BY SECTION 524.

The Bank argues that because the term "debts" is used in § 727(b) in describing what is discharged by a Chapter 7 discharge, then necessarily the same "debts" cannot exist after a Chapter 7 discharge for purposes of a Chapter 13 bankruptcy. In other words, once the "debts" are discharged in the Chapter 7 proceeding, they no longer exist for the subsequent Chapter 13. However, the Bank's argument ignores the provisions of § 524.

The term "discharges" is not defined in the Bankruptcy Code. Therefore, when § 727(b) provides that "a discharge under subsection (a) of [§ 727] discharges the debtor from all debts that arose before the date of [the bankruptcy filing]," one must look to § 524 to determine the effect of a discharge. Section 524 provides as follows:

> (a) A discharge in a case under this title –
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the *personal liability of the debtor* with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt *as a personal liability of the debtor*, whether or not discharge of such debt is waived;
>
> * * *

Thus, under section 727(b), when "debts" are discharged, only the personal liability of the debtor is extinguished; liens and *in rem* liabilities remain intact.

That Congress only intended to effect the *in personam* portion of indebtedness by granting a Chapter 7 discharge, is emphasized by the amendments made to section 524 by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353, 98 Stat. 333 (1984). Prior to the amendment, section 524(a)(2) provided as follows:

> (a) A discharge in a case under this title –
>
> * * *
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, *or from property of the debtor*, whether or not discharge of such debt is waived. (Emphasis added)

The amendment eliminated the phrase "or from property of the debtor" to leave no doubt that a discharge extinguishes only the *in personam* part of secured debts. *Grundy National Bank v. Johnson*, 106 B.R. 95, 97 (W. D. Va. 1989). While § 727(b) does provide for the "discharge" of "debts," Congress has limited the effect of a discharge to a debtor's personal liabilities, allowing creditors to proceed on their liens and *in rem* rights notwithstanding the discharge. Thus the question presented for review herein arises.

2. THE BANK IS A "CREDITOR."

The Bank argues that it is not a "creditor" as defined by § 101(9)(A). There, "creditor" is defined as an "entity

that has a *claim against the debtor* that arose at the time of or before the order for relief concerning the debtor. . . . " (Emphasis added) Applying the rule of construction at § 102(2), the definition would provide that a creditor is an "entity that has a [claim against property of the debtor] that arose at the time of or before the order for relief concerning the debtor. . . . " There is simply no question that the Bank has a claim against Johnson's property and, therefore, is a "creditor."

3. THE RELIEF AVAILABLE UNDER CHAPTER 7 AND CHAPTER 13 IS NOT MUTUALLY EXCLUSIVE.

The Bank takes the position that the relief afforded under Chapter 13 and Chapter 7 is mutually exclusive; however, the Bankruptcy Code indicates otherwise. Congress specifically prohibited bankruptcy relief in only a few limited situations.[2] If Congress had intended that the relief available under Chapter 13 and Chapter 7 be mutually exclusive, such a provision could easily have been enacted along with the other restrictions.

4. JOHNSON'S PLAN IS NOT CONTRARY TO OTHER PROVISIONS OF THE BANKRUPTCY CODE.

(a) The Requirements of Section 1325(a)(4) Were Satisfied.

The Bank argues that Johnson's plan is contrary to the requirements of § 1325(a)(4).[3] It states that the

[2] See §§ 109, 523 and 727.

[3] This argument is raised here for the first time on appeal. This argument has not been raised on appeal in either the district court or the court of appeals.

bankruptcy court used Johnson's estimate of value in confirming the plan. The bankruptcy court made its determination of value after an evidentiary hearing. At that hearing, the Bank failed to provide testimony as to value,[4] but merely cross-examined Johnson's witnesses. Based on the testimony, the bankruptcy court assigned the values urged by Johnson. Under the plan, that value was to be paid the Bank with interest over five years. Thus, under the plan the Bank was to receive the present value of its collateral and, as such, the "Chapter 7 test" of § 1325(a)(4) was satisfied.

(b) Whether Or Not Johnson Proposes To Return His Property To The Bank, The Bank Has A Right To Payment.

The Bank suggests that because Johnson did not propose in his plan to return his property to the Bank, the Bank has no "right to payment" as contemplated by § 101(4). The Bank is confusing its *rights* with its treatment under the plan. The Bank, by virtue of its foreclosure judgment, has a *right* to receive Johnson's land and, therefore, has a *right* to payment. The Bank will always have a *right* to receive Johnson's land until the Bank has been paid for it. Whether or not Johnson proposed to transfer his land to the Bank in the plan does not affect the Bank's *right* to receive it and, therefore, does not affect its *right* to payment.

(c) The Requirements Of Section 1325(b)(1)(B) Were Satisfied By The Plan.

Section 1325(b)(1)(B) merely provides that if an unsecured creditor objects to a plan, the plan must

[4] See Pet. p. App. 32.

provide for payment in full to the creditor or provide for the payment of all of the debtor's disposable income to the plan. The Bank argues that because there were no unsecured creditors in this plan, § 1325(b)(1)(B) was not satisfied.[5] Such an argument creates another restriction on Chapter 13 relief – that all Chapter 13 debtors must have unsecured debt. Section 109(e) does not so provide. Further, Johnson's plan clearly provides for the payment of all disposable income, a fact emphasized by the Bank's argument that the plan is not feasible.

(d) Johnson's Plan Does Not Improperly Extend The Automatic Stay Nor The Kansas Redemption Period.

The Bank argues that Johnson's plan improperly extended the automatic stay allowed by § 362 and the redemption period allowed by Kansas law.[6] The Bank obtained relief from the automatic stay in the Johnsons' Chapter 7 bankruptcy and proceeded with its foreclosure action. In the process, the Bank improperly bid its judgment at the foreclosure sale which resulted in the Kansas Supreme Court's order setting aside the sale and ordering that a new sale be conducted. See *Home State Bank v. Johnson*, 240 Kan. 417, 729 P.2d 1225 (1986). Under Kansas law, the redemption period does not begin until the sheriff's sale has been concluded.[7] After the foreclosure

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[5] This argument is raised here for the first time on appeal. This argument has not been raised on appeal in either the district court or the court of appeals.

[6] See Kansas Statutes Annotated 60-2414.

[7] Id.

case was remanded by the Kansas Supreme Court to the Kansas trial court, the second sale was not conducted because Johnson filed the instant Chapter 13 proceeding. Thus, Johnson's redemption rights have not been extended as a result of the Chapter 13 filing because the redemption rights had not yet begun when the Chapter 13 was filed. Further, as to the extension of the automatic stay, it should be noted that the Bank obtained relief from the automatic stay after the court of appeals entered its mandate affirming the district court, but before the court of appeals withdrew its mandate pending this Court's ruling on Johnson's Petition for Writ of Certiorari. The Bank has sold Johnson's property and the redemption period is now running.

(e) Johnson Had Received His Chapter 7 Discharge Before Filing His Chapter 13 Bankruptcy.

The Bank relies on *Associates Financial Serv. Corp. vs. Cowen*, 29 B.R. 888 (Bankr. S.D. Ohio 1983) in arguing that Johnson's Chapter 13 filing was improper. However, in *Cowen, supra*, the debtors had not yet received their discharge at the time they filed their Chapter 13 bankruptcy. In *Cowen, supra*, the court stated that "[t]he 'serial' filing of a successive Chapter 13 petition may not be permitted until, at the earliest, after the granting of the discharge in the prior Chapter 7 proceeding." [Citations omitted] *Id.* at 895. Having received his Chapter 7 discharge before initiating his Chapter 13 bankruptcy, Johnson was eligible for Chapter 13 relief even under the Bank's authority.

5. THE QUESTIONS OF GOOD FAITH AND FEASIBILITY ARE NOT PROPERLY BEFORE THE COURT.

The Bank argues that the decision of the court of appeals should be affirmed on other grounds – specifically that the plan was not submitted in good faith and is not feasible. The questions of good faith and feasibility have not been ruled upon since the bankruptcy court confirmed Johnson's plan. Those questions are not fairly contained within the question presented for review upon which certiorari was granted. The Court, this term, refused to address a question raised by a party under very similar circumstances in *Air Courier Conference of America vs. American Postal Workers Union*, 59 U.S.L.W. 4140, 4142 (U.S. Feb. 26, 1991). In like fashion, the Court here should decline to decide the questions of good faith and feasibility.

The Bank relies on *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 Sup.Ct. 740, 58 L.Ed.2d 740 (1979). There, however, the Court determined that the issue Washington urged was not before the Court "was implicit in the subjects the parties were requested to address in our order noting probable jurisdiction of this appeal." *Id.* at 99 Sup.Ct. 749, n. 20. Here, however, the Court granted Johnson's Petition for Writ of Certiorari on a very narrowly framed issue which does not include issues on good faith or feasibility.

E. CONCLUSION

Johnson respectfully requests that the Court reverse the decision of the court below and remand the case to the district court for further proceedings on the undecided questions raised by the Bank in its appeal from the bankruptcy court.

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